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No. 82-556
IN THE

Supreme Court of the United States

October Term, 1982

THE PRESS-ENTERPRISE COMPANY, a California Corporation
Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF RIVERSIDE,
THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF RIVERSIDE,
Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

vs.

ALBERT GREENWOOD BROWN, JR.,
Defendant.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO.

BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE AND CONSENT

Joseph Peter Myers was, by appointment of the Respondent Court, counsel for Defendant, Albert Greenwood Brown, Jr., through his trial on charges of murder and rape. Special circumstances were alleged in the Information, and the Plaintiff sought the penalty of death in the proceedings.

In large part due to the insistence of trial counsel for both parties, the Respondent Court barred the press and public from certain portions of the jury selection process. Amicus herein sought to protect the rights of the Defendant to a fair trail and due process of law, as well as the effective assistance of counsel, and to preserve the ability to select a fair and impartial jury panel in a case in which the most serious and emotional of issues were presented — the rape and strangulation killing of a fifteen year old white schoolgirl on her way to school, by a black man twenty-six years of age, with a prior conviction of forcible rape on an adolescent caucasian girl. Amicus insisted that jurors who were to be questioned in these most sensitive of areas, particularly as their feelings would be involved in the imposition of the alternative penalties of death or life imprisonment without possibility of parole, could not do so honestly, or without substantial invasions of their privacy, in the absence of an order closing the proceedings. Amicus was joined in such requests, at every instance, by the Deputy District Attorney for the County of Riverside who prosecuted the action.

There being no national organizations of potential jurors, and having a direct interest in the resolution of the issues before this Court, Amicus submits this brief.

Written consent to the filing of this brief has been given by counsel for petitioner and respondent, respectively, and accompanies the brief.

ARGUMENT

Because this brief is intended to be extremely limited in length, a Summary of argument is omitted. It is the purpose of Amicus Curiae herein to present the philosophical and practical problems facing trial counsel and veniremen and women placed into the cauldron of publicity which accompanies cases such as this one, and the reasoning, accepted by Respondent Court, which so clearly justifies the orders which this Court will review. In making such statements, certain arguments presented by others in support of the Petitioner's position will be discussed as well.

A. Historical considerations do not support Petitioner's position.

While historical search for the origins of the jury system and the processes of jury selection is interesting, it necessarily ignores the difficulties posed by modern communications media as these intrude into the ancient system that criminal trials represent. What Petitioner and *Amici* in its support ignore is the simple fact that an individual citizen who becomes involved as a prospective juror in a serious criminal trial has no choice but to follow the directives of the Court. At the same time, such a citizen should not have to be deprived of all privacy rights, or risk the exposure of his or her most intimate feelings and experiences to broad segments of the public who have no need for such information. In California, as shown in other briefs filed herein, such questioning is virtually unlimited in scope, and even the request of a potential juror to avoid answering a question put by the Court or counsel, or to make his own request for a private hearing, could focus extreme public attention upon that individual.

Even though these considerations undoubtedly existed historically within smaller communities, or even large urban centers, modern broadcast and print media have the capacity to disseminate information virtually instantaneously to our entire society. And, while Petitioner is conceded to be a newspaper which behaves responsibly, First Amendment

considerations would preclude any Court from selectively barring access to jury selection proceedings, or trials, to particular reporters or news gatherers based upon a perceived "responsibility" factor. Thus, newspapers dealing far more with the seamy sides of modern life, often with little regard for accuracy or propriety, would be invited to share in the intimate feelings of veniremen, and to report their experiences, simply because they might tittilate their audience. Even if such conduct is allowed with public figures as the subject matter, it ought not to be permitted when ordinary citizens are called to be examined as prospective jurors.

B. Recent instances cited by *Amici* do not support opening jury selection.

It is interesting to note that the Amicus Curiae brief of the Society of Professional Journalists, Sigma Delta Chi, et al., prepared by Mr. Bruce W. Sanford, at pp 20-21, discusses "public confidence" in the administration of justice in connection with the trial of John W. Hinckley, Jr., and notes that the revelation of jurors' relatives who had been confined to mental hospitals had disturbed the reading public. Perhaps. Yet, the United States Attorney prosecuting Mr. Hinckley and Mr. Hinckley's counsel each understood clearly the issues in that case. Potential jurors, too, were apprised of the insanity defense. How could either party to that trial have expected jurors to reveal such "skeletons in their closets" if the proceeding had not been closed? Truthful answers to voir dire questioning on that particular subject matter — personal acquaintance with persons having emotional or mental problems — was absolutely essential in connection with that trial. Had such proceedings been open, it is obvious that potential jurors, faced with the certainty of national publicity of their own family tragedies and difficulties, would not have been able to fulfill their duties and their oaths. And the harm of allowing access to the transcripts of jury selection subsequent to the trial is surely shown by the apparent reaction

of the public to the news accounts. That reaction included hostility to the jurors involved. We expect jurors to be judges of the facts, and to apply often complex laws. We cannot forget that they are human beings.

The administration of justice cannot function in the dark. The development of a rule of access to jury selection proceedings, regardless of the pain or deprivation of rights of privacy to citizen-jurors, could only serve to drive the most intimate, and the most relevant, feelings and concerns of potential jurors even further from the light. Regardless of "public perception" of the fairness of a trial, an accused cannot possibly have a fair trial, or due process, or the effective help of an attorney, where public access to jury selection would itself subvert that process and virtually force potential jurors to hide or distort the truth about their experiences and opinions.

C. Respondent Court did articulate findings in support of the closure of jury selection.

On May 17, 1983, in a hearing requested by the Attorney General of the State of California, Respondent Court further articulated the reasons and findings which supported the orders Petitioners complain of. Unfortunately, the record of that hearing is not yet corrected. Hopefully, Counsel for Petitioner and Respondent will supplement the record in these proceedings with a corrected record. However, Respondent Court did indicate that there was a substantial probability of irreparable harm to a compelling interest, viz., the rights of the Defendant as well as the rights of privacy of the jury panel. Respondent Court held that hearings suggested by Counsel for Defendant inquiring of prospective and seated jurors as to their desires for confidentiality would be too burdensome. Finally, it was clear that the jurors' feelings and experiences, and situations revealed to both prosecutor and defense counsel during the selection process, were entitled to privacy.

With regard to the last point, Amicus represents, as a Member of the Bar of this Court, that a number of female jurors revealed that they were victims of sexual abuse, and that there had been a claim within one family of an interracial rape, and these issues were carefully probed. Other jurors dealt with intimate feelings about race and sex, as well as their religious and political preferences and ideas. Still others deal with gruesome photographs which were to be introduced as evidence in the trial. Obviously, at a time when the popularity of the death penalty is ever-increasing, jurors were asked about that issue — and those who believed in non-imposition of such a penalty did not have to face public revelation of that now unpopular stance.

CONCLUSION

The effort of Petitioner and Amici Curiae in its support, ostensibly to "preserve" the jury selection process, is based upon a rejection of one of the most obvious traits of human beings — that they desire and need privacy. If jurors must choose between preserving their own rights and the protection of their families from potentially disastrous publicity, and the rights of a defendant or the prosecution to know their views, that choice may destroy the integrity of the jury sytem. It is useless to exchange some potential and slight increase in public approval of the jury system for the right of access, by the parties to the action, to the information so vital to their interests. For these reasons, Amicus Curiae respectfully urges that the decision below be upheld.

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